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IN THE SUPREME COURT
of the
UNITED STATES
OCTOBER TERM, 1956 7

No. ~~781~~ 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT
Opposing Petition For Writ Of Certiorari By Ezra Taft Benson, Secretary of Agriculture of the United States

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No. 981

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,

Respondent.

BRIEF OF RESPONDENT

Opposing Petition For Writ Of
Certiorari By
Ezra Taft Benson, Secretary of Agriculture
of the United States

FOREWORD

Respondent submits the Petition of the Secretary for Writ of Certiorari herein upon its "Brief of Res-

pondent Opposing Petition For Writ of Certiorari by Denver Union Stock Yard Company" already on file in an earlier proceeding, by Denver Union Stock Yard Company, seeking review of the decision of the Court of Appeals below, No. 917, October Term, 1956, but adds the matters herein set out.

The Secretary of Agriculture's Petition for Writ of Certiorari here (No. 981, filed May 8, 1957) is the *second* petition to seek review of the decision by the Court of Appeals below outlawing the Denver Stock Yard Company's shocking Regulation — as void in *law* upon its *face* — for refusing stockyard services to Respondent (a licensed livestock marketing agency at the stockyard) and others, if they shall deal in livestock in the country area of Colorado — *without routing the livestock to the Denver stockyard.*[1]

The Regulation was issued by the *stockyard.* It was *not issued or prescribed* by the Secretary or Department of Agriculture. The latter got into the case only as a *forum* — a *quasi* court or tribunal — to hear and try Respondent's complaint filed with the Department against the Stock Yard Company to *annul* the Regulation. The proceeding originated before the Secretary of Agriculture in this style (R. 6):

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1. The first Petition for Certiorari was filed April 17, 1957 by Denver Union Stock Yard Company, Petitioner, No. 917.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Producers Livestock Marketing Association, *Complainant,* vs. The Denver Union Stock Yard Company, *Respondent.*	P&S Docket No. 2176

The Secretary upheld the Regulation. The Court of Appeals reversed. On appeal to the Court of Appeals (Petition for Review) under the Hobbs Act (5 U.S.C. §1034) Respondent became *Petitioner* and the United States, *Respondent.* By rule of the Tenth Circuit (28 U.S.C.A., p. 541, Rule 34-1) the Secretary was also joined as *Respondent.* And the Stock Yard Company intervened "as of right" under the Hobbs Act, 5 U.S.C. §1038. Thus, the proceeding in the Court of Appeals was in the style shown in the margin.[2]

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2. UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5459

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, a corporation of Salt Lake City, Utah,
Petitioner,

vs.

UNITED STATES of AMERICA and EZRA TAFT BENSON, Secretary of Agriculture,
Respondents,

DENVER UNION STOCKYARD COMPANY,
Intervener-Respondent.

(R. 1. 241 F. 2d 192. Secretary's Petition for Cert. P. 25)

It is quickly apparent that in reality, this is actually a *private* two-party controversy between two litigants: (1) Producers Livestock Marketing Association - complainant (plaintiff) in the complaint before the Secretary, and, (2) Denver Union Stockyard Company - respondent (defendant) in that complaint; and that although the Secretary of Agriculture was *forced* by the Hobbs Act to be made a party - respondent in the Court of Appeals, his presence there was only *nominal;* he and the Department of Agriculture having been only the *forum* or *tribunal* who heard and decided the case between the *two parties in interest* at the outset.

The Secretary did not *issue* or *prescribe* the Regulation. The stockyard did. The Secretary did not file or *initiate* any complaint or proceeding thereunder. Respondent - Producers Livestock Marketing Association - did. This is *not* a case where a Government officer or agency issued a complaint or seeks enforcement.[3] And the presence of the United States (a total stranger theretofore) as Respondent in the Court of Appeals is perplexing. The only justification for the Secretary and the United States being Respondents in the Court of Appeals is the command of the Hobbs Act, supra.

We have, then, two petitions for certiorari: one by a *real* party in interest — Denver Union Stock

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3. For example, not like the National Labor Relations Board's issuing a complaint for unfair labor practices. 29 U.S.C. §160. Nor did the Secretary, himself commence this case "on his own initiative", as permitted by the Packers & Stockyards Act. 7 U.S.C. §211 *Respondent* filed the complaint before the Secretary.

Yard Company; the other, by a *nominal* party, only — the Secretary. And, although the United States might also have appealed,[4] it has refused to do so and must, by refusal of the Attorney General and Solicitor General, be deemed to *approve* the decision of the Court of Appeals.

4. "Either the United States or the Agency or any *aggrieved* party may petition for writ of certiorari". Hobbs Act. 5 U.S.C. §1040.

QUESTION PRESENTED

To begin with, the two petitioners, the Stock Yard Company and the Secretary, cannot agree on the question presented. For example, the Stock Yard questions the Court of Appeals' ruling that a "full hearing" resulted in the proceeding before the Secretary, whereas, not one word of denial of "full hearing" as such appears in the Secretary's statement of the question involved. (Stock Yard Company's Petition, P. 3. Secretary's Petition, P. 2).

In No. 917, we expressed our disagreement with the Stock Yard Company's statement of the question presented. We said:

> " A single question, only, is presented:
>
> "Is the Regulation here on trial which was issued by the Denver Union Stock Yard Company (a public utility) legal upon its face as a matter of law?" (Brief of Respondent Opposing Certiorari. No. 917. P. 1).

The Secretary now *concedes*, for while he lists three questions in his Petition (P. 2), he later firmly acknowledges the ultimate and "basic" question to be as we have stated it, for he says the Secretary's Judicial Officer's decision was upon —

> "the basic issue, viz., whether the Regulations are, as a matter of law, illegal on their *face* . . .". (Secretary's Petition, P. 8).

and:

> ". . . the issue for decision is . . . but only the narrow question as to whether the Regulations are, as to matter of law, invalid on their *face*." (Id., P. 9).

We agree that is the *narrow* question involved. The Court of Appeals *decided* it was.[5] The Secretary *concedes* it is. Only the Stock Yard Company *contends* otherwise.

5. The Court of Appeals said: "The Regulation is invalid upon its face and the cause is accordingly remanded" etc. 241 F. 2d 197.

STATEMENT OF THE CASE

In earlier pages, we have shown how the case arose by Respondent's lodging a complaint before the Secretary and Department of Agriculture, that the latter upheld the Regulation on its *face*, but that the Court of Appeals reversed and held the Regulation was void on its *face*.

In reality, this is actually a *private* two-party law suit between Respondent (Producers Livestock Marketing Association) and Petitioner (Denver Union Stock Yard Company, in No. 917). The Secretary and Department of Agriculture were not parties, but only the *forum* who heard and tried the law suit before the Department. One of the parties — the Stock Yard Company — has appealed. The *forum* now appeals also. That is the forum's statutory right under the Hobbs Act. 5 U.S.C. §1040. But, the Act's bestowal of the right to appeal upon the *forum* or *tribunal* or *adjudicator*, itself, cannot lessen the awkwardness of the forum's position in casting aside its earlier role as *adjudicator* and donning, now, the role of litigant — thus taking sides on appeal to sustain its own decision below where it was forum and adjudicator only. True the Hobbs Act says the Secretary may reshuffle his position in that fashion, but the Department of Agriculture, nevertheless, is now cast in the role of litigant, whereas it was only adjudicator below — without interest there save only to decide impartially.

And, here we wish to point out that the United States — one of the Respondents below — has not

appealed, although the Hobbs Act permits it to do so, no less than the Secretary.[6] That can only mean one thing: that the Attorney General and Solicitor General are satisfied with the decision of the Court of Appeals.

6. 5 U.S.C. §1040.

ARGUMENT

1.

Respondent Submits The Secretary's Petition For Writ Of Certiorari Upon Its Brief Of Respondent Opposing Writ Of Certiorari By Denver Union Stock Yard Company In No. 917 And Upon Additional Argument Here.

Respondent submits the Secretary's Petition for Writ of Certiorari on Respondent's opposing brief in No. 917 above, but adds the matter herein.

2.

Arguments Of The Secretary Against The Decision Of The Court Of Appeals Are Without Merit.

The Secretary argues thus:

SOME STOCKYARDS LIMIT THE NUMBER OF PERSONS TO BE SERVED. True. They must. They can only handle so many. They are exactly like other public utilities — railroads, airlines, bus lines, etc., in that respect. When they reach a capacity load, they can serve no others. That is only common sense.

STOCKYARDS MAY DENY SERVICE TO CROOKS AND THIEVES. Certainly they may. *Kelly* vs. *Union Stockyard and Transit Company* (7 Cir.) 190 F. 2d 860. Cf. *Sig Ellingson and Company* vs. *DeVries* (8 Cir.) 199 F. 2d 677. Cert. den. 73 S. Ct. 505.

ADMINISTRATION OF PACKERS AND STOCKYARDS ACT CLAIMED TO BE RENDERED UNCERTAIN OR INDEFINITE BY COURT OF APPEALS DECISION. Not so. This was the Stock Yard's Regulation. *Not* the Secretary's. The stockyard would do its own administering; not the Secretary. The Secretary administered the *Act* before and without Denver's self-made Regulation. He can go on administering the *Act* despite the Regulation's being stricken down.

SIMILARITY OF REGULATIONS CLAIMED AT OTHER STOCKYARDS. The Secretary lists certain stockyards which he claims have regulations "similar" to the one here. There is no such proof upon this record. His sojourn is entirely *dehors*. But, since he

has elected to travel beyond this record, we can only reply and say that we are informed the regulations mentioned are not like the one here. They may *govern* the customer in certain respects, e.g., as to the use of stockyard facilities as such, etc., or even provide other proper restrictions, as the stockyards have a right to do, but, except for Los Angeles, and perhaps Baltimore and a small yard at Jonesboro, Arkansas, we are informed of none that are like the one on trial here — excluding those who may deal in the country and thus "lawfully trod upon its (stockyard's) economic toes".[7]

If at another stockyard, those affected may be willing to submit thereto — even acquiesce over a period of time and thus in law *accept* or *validate* a regulation similarly offensive to the one at Denver — let them, *not Respondent*, suffer the consequence of their acquiescence. The void Regulation here cannot be validated as against Respondent by the legal sophistry of pointing out another's acquiescence at some other stockyard.

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7. Opinion below. 241 F. 2d 196.

CONCLUSION

Respondent submits::

1. This, in reality, is actually a private law suit between two parties only — Petitioner, the Stock Yard Company, and Respondent, a licensed market agency at the yard — over a Regulation issued by the Stock Yard Company itself.

2. The Secretary and Department of Agriculture did not *issue* or *prescribe* the Regulation on trial, nor would they have been charged with its enforcement or administration. They came into this *private* law suit only as a *forum* or *tribunal* or *adjudicator* to hear and decide as between the two litigants. The Hobbs Act[8] *forced* the Secretary to be named as Respondent on appeal to the Court of Appeals. Likewise, the United States of America. But, both the Secretary and the United States were only *nominal* parties — respondents.

3. While the Hobbs Act permits both *nominal* parties — the Secretary of Agriculture and the United States — to petition this Court for review, only the Secretary has done so.

4. The refusal of the United States to seek review can only be interpreted to mean: That the Attorney General and Solicitor General are satisfied with the decision of the Court of Appeals. Otherwise, they, too, would have sought to have it reversed.

5. A single question, only, is presented: Is the Regulation invalid upon its *face* as a matter of *law?*

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8. 5 U.S.C. §1040.

The Court of Appeals held it was. We contend it is. The Secretary concedes that it is.

6. Respondent submits the Secretary's Petition for Writ of Certiorari upon:

— This Brief herein, and,

— The Brief of Respondent Opposing Petition For Writ of Certiorari by Denver Union Stock Yard Company already on file in No. 917, October Term, 1956.

7. The judgment of the Court of Appeals declaring the Regulation to be invalid upon its *face* as a matter of law and that the StockYard Company shall not be permitted to enforce it, is correct. The Petition of the Secretary of Agriculture for Writ of Certiorari must be denied.

Respectfully submitted,

May 1957

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